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I. Respondent Misrepresents the Content of the Stipulations made between the parties in its statement of facts section and throughout its

brief.

Respondent contends that Appellant has omitted relevant facts from the "Statement of Facts" in the Brief of Appellant, and sets about to supplement the "Statement of Facts" with a recitation of those allegedly omitted items; certain alleged stipulations between the parties that Respondent later argues are controlling upon the Points Relied On. In doing so, Respondent significantly misrepresents the content, and misconstrues the nature and import of the pre-trial stipulations. There were only two stipulations made between the parties, accepted by the Trial Court, and made of record through the Trial Court's Order dated April 2, 2003:

1. "The parties have stipulated that each could amend their respective petitions to allege a request for attorneys fees under § 431.180 RSMo, Private Prompt Payment Act." (L.F. p.88), and,

2. "Further, the parties have stipulated that the issue of award of attorney fees would be determined by the Court after the jury renders verdicts as to the underlying claim and counterclaim." (L.F. p.88)

Nowhere in the Order entered by the Court, is there a stipulation regarding the Court's authority to decide the issue, or a stipulation or finding that either party was entitled to attorney's fees.

A. Respondent consistently misconstrues the stipulations and Court

Order throughout its brief.

In Respondent's Substitute Brief, point I, page 11, it states that the Trial Court's Order permitted the amendment of the pleadings, which was the case. It goes on to say that the Order found "that if Obermiller prevailed, it would be entitled to fees under § 431.180." (Respondent's Brief last paragraph at 11) That is a gross misstatement of the finding in the Court's Order. The Order states that "the issue of attorney's fees would be determined by the Court after the jury renders verdicts as to the underlying claim and counterclaim." (L.F. at 88) Additionally the very last sentence of the Order states that "the attorney fee provisions, **may be applicable** to Defendant Obermiller, should it prevail against Plaintiff Vance Brother's claims." (L.F. at 90 (emphasis added))

B. Appellant <u>NEVER</u> stipulated to the authority of the Trial Court to award attorney's fees to Respondent.

The stipulation referred to in Point II of Respondent's brief is again misconstrued, and taken out of context. The stipulation was that the issue of award of attorney fees would be determined by the Court. (L.F. at 88) This stipulation took the question out of the hands of the jury and placed it with the trial Judge. Appellant Obermiller contended that the Trial Court had the authority and discretion to award **IT** attorney's fees based on its counter-claim sounding in contract. Appellant did not agree, or stipulate that attorney fees were available

under the Respondent Vance's pleadings.

Contrary to the position of the Respondent, in point IV on page 13, there is not a stipulation in the Court Order, which speaks on the Court's Authority to award attorney's fees. The word authority is not used in the Order of April 2, 2003. (L.F. at 88)

C. Appellant was not required to raise a jurisdictional error prior to Appeal and was not required to ask for relief in a motion for new trial.

Respondent, in point VI, is correct in that the motion for new trial does not contain specific allegations of error relating to the award of attorney's fees. The reasons for this are two fold. The Motion was filed the day of the hearing on attorney's fees. Second the issue of attorney's fees was a matter tried before the Court by stipulation, thus 78.07(b) is to be applied to the matter. Rule 78.07. In contrast to Rule 78.07(a), Rule 78.07(b) does not require the matter to be raised in a motion for new trial or a motion to amend. *Id.*

II. REPLY ARGUMENT

A. Preservation of issue for Appellate Review.

Respondent Vance argues that the issue of attorney's fees is not properly preserved for appellate review. This is incorrect. The second stipulation recorded in the Trial Court's Order of April 2, 2003, was that "the parties have stipulated

that the issue of award of attorney fees would be determined by the Court after the jury renders verdicts as to the underlying claim and counterclaim." (L.F. at 88)

Although the Respondent does not, it its brief, misconstrue the content of the second stipulation, Respondent does fail to recognize the procedural significance of this second stipulation upon the manner in which a party is required to preserve its issues for appellate review. In taking the determination of entitlement to attorney's fees away from the jury and reserving it to the trial judge for a post verdict hearing, the parties have brought the issue of attorney's fees in this action from a jury tried matter to a judge tried matter.

Respondent argues that Appellant failed to preserve the issue of attorney fees for appeal by omitting such a claim of error from its Motion for New Trial. For this proposition, Respondent would, incorrectly rely upon *Missouri Supreme Court Rule 78.07(a)*. That subsection clearly applies only to "jury tried" cases. On the contrary, *Missouri Supreme Court Rule 78.07(b)* is the subsection that applies to cases or matters tried without a jury, and states: "(b) In cases tried without a jury or with an advisory jury, neither a motion for new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review." A similar misapplication of the law was addressed in *Rowe v. Moss,* 656 S.W.2d 318 (Mo. App. S.D. 1983): "Defendants contend that as plaintiff failed to raise his remaining two points in his motion for new trial, they are not preserved for

appellate review. That is not correct. In a non-jury case a motion for new trial is not necessary to preserve contentions for review and an Appellant may raise on appeal points not mentioned in the motion." *Id.*. at 322.

From a procedural standpoint, it is interesting to note as well that the hearing held by the Trial Court on the issue of entitlement to attorneys fees was held on the very same day (April 25, 2003, L.F. p.009) that Appellant filed its motion for new trial (L.F. p.104). The court's ruling upon the argument that day was not entered of record until May 10, 2003. (L.F. p.010). It obviously would have been impossible to include a claim of error in a motion for new trial when the ruling claimed to be in error was not even issued until 15 days after the motion for new trial was filed.

Respondent does also infer in various places throughout its Substitute Brief that Appellant should be barred from raising on appeal the issue of entitlement to an award of fees because Appellant had not previously argued jurisdiction to the Trial Court.

Prior to the close of trial, there was no motion, hearing or cause requiring Appellant to address whether or not Respondent was entitled to an award of fees. When the issue of entitlement to fees was first briefed by Appellant on March 25, 2003 and then argued on April 1, 2003, it was Appellant's entitlement to request fees that was at issue. Appellant brought a motion to amend its counterclaim to

pray for fees and, although there was a stipulation between the parties that "…each could amend their respective petitions to allege a request for attorneys fees," (Order of Court dated April 2, 2003, L.F. p.087-090), Respondent never brought such a similar motion prior to the close of trial that would have required Appellant to make such arguments against Respondent's entitlement to fees. It should also be noted that while Appellant Obermiller did in fact amend its pleadings to reflect a claim for attorney's fees, Respondent Vance never amended its written pleadings to request such relief.

In arguing that Appellant is precluded from arguing entitlement to fees on appeal because it failed to do so in post-trial motions, Respondent fails to address the following two cases. *Consolidated Public Water Supply Dist. No. C-1 of Jefferson County v. Kreuter*, 929 S.W.2d 314, 316 (Mo. App. E.D. 1996): stated: "Although awards of attorney's fees are left to the broad discretion of the Trial Court and will not be overturned except for abuse of discretion, this standard is based on the assumption that the court had the authority to award the fees. Because our inquiry involves the question of the Trial Court's authority to award attorney's fees, this court need not defer to its decision." *Environmental Protection, Inspection, and Consulting, Inc., v. City of Kansas City* stood as well for the proposition that "Because submissibility [of entitlement to award of jury fees under the Public Prompt Payment Act] presents a question of law, our determination is de

novo." *Environmental Protection, Inspection, and Consulting, Inc., v. City of Kansas City*, 37 S.W.3d 360, 369 (Mo.App. W.D., 2000).

Additionally, under *Missouri Revised Statutes § 510.310(4) "Procedure in cases tried upon facts without a jury,"* Section (4) provides that: "No findings of fact, except such as shall have been specifically requested, and no conclusions of law or objections to the judgment or to the opinion of the court are necessary for purposes of review. The question of the sufficiency of the evidence to support the judgment may be raised whether or not the question was raised in the Trial Court." § 510.310(4) RSMo. (2000) (emphasis added).

This sub-section of the statute has been interpreted to allow appeals upon matters in which, although no argument was made in motion or otherwise to the Trial Court on the appealed issue, the point on appeal was in the nature of the claim that the opposing party never made a showing of entitlement to the relief granted.

In *O'Neal v. Mavrakos Candy Co.*, the Respondent there complained that the Appellant had raised for the first time on appeal the argument that the wrong cause of action had been plead to support the relief granted, with the Court stating:

> "It is true that defendant's motion for verdict at the close of plaintiff's evidence and again at the close of all the evidence, and also the motion for a new trial were too general to call to the attention of the

> Trial Court specifically the objection that the petition declared on an express contract and was not supported by the evidence of a mere implied agreement to pay the reasonable value of plaintiff's services. But this was a case tried without a jury. In the absence of a waiver of such objection by the express or implied consent of the defendant, which we have ruled above is not shown by the record, then Section 510.310(4) applies, which provides: 'The question of the sufficiency of the evidence to support the judgment may be raised whether or not the question was raised in the Trial Court'."

O'Neal v. Mavrakos Candy Co., 255 S.W.2d 138, 143 (Mo. App. 1952). See, also, *Greaves v. Huber,* 235 S.W.2d 86, 92 (Mo. App. 1950): "…in cases tried by the court the sufficiency of the evidence to support the judgment may be raised on appeal whether or not that question was raised in the Trial Court. … We are obliged to consider the Appellant's point for the essence of his complaint is that the evidence does not support the court's decree."

Finally, even in matters that are tried to a jury, both "(B) Questions of jurisdiction over the subject matter;" and "(C) Questions as to the sufficiency of the pleadings to state a claim or defense" such "…matters need not be included in such a motion for a new trial in Order to be preserved for appeal." Rule 78.07(a)(B)-(C). Such issues have always been considered reviewable by the

Appellate Court de novo.

B. Summary Reply to Respondent's Arguments.

Respondent believes that the Court of Appeals was correct in not distinguishing between a suit on account and a suit in contract. (Respondent's Brief at Page 19) Appellant Obermiller argues that the Court of Appeals was incorrect in not finding a difference between a suit on account and a suit in contract for the purposes of application of § 431.180 RSMo. There are a multitude of reasons why there is a difference, not the least of which is that the Missouri Approved Instructions differentiate between account and contract and do not include the elements of contract in the necessary findings for a suit on account. Missouri Approved Instruction 26.03 is appropriate verdict directing for a suit on account versus Missouri Approved Instruction 26.06 verdict director for a suit on contract. (MAI 26.03 (2002), MAI 26.06 (2002)). The Respondent filed suit on account because it would not be able to succeed on a suit based in contract. The proposal of Vance is on Vance's letterhead, dated November 6, 2000. (L.F. at 22, 23) The quote was accepted by Obermiller. No terms for payment or date of payment are mentioned at all in the proposal. The work by Vance was not performed until between May and June of 2001. However, the quantity and type of work performed was different than that contained in the proposal. Section 431.180 is captioned "scheduled payments pursuant to private construction

contracts". § 431.180 RSMo. (2004). This proposal submitted by Vance lacked certain elements necessary to comply with § 431.180. A suit and award of attorney fees based on this proposal is certainly not what the legislature contemplated when it enacted § 431.180. Respondent Vance filed a petition on account. (L.F. at 11). There are significant differences between a suit on contract and a suit on account. The legislature has noted and worded applicability of certain statutes based on these differences.

Respondent sets forth an argument of invited error. (Respondent's Brief at page 20-21) Respondent's entire argument for invited error is premised upon false interpretations of pleadings and trial stipulations. As discussed above, the parties did not stipulate to the Court's Authority to award attorney fees. Obermiller contended throughout that it was entitled to attorney fees if it succeeded at trial on their counterclaim based on contract. Obermiller never stipulated to, or admitted that Respondent Vance was entitled to an award of attorney's fees based on its suit on account. All of Respondent Vance's explanation of invited error is moot because of the inapplicability of the doctrine because of their misunderstanding of the position taken by Appellant Obermiller throughout the proceedings.

Third, Respondent argues that it is entitled to rely on a stipulation and judicial admissions. While ordinarily that would be the case, Respondent is not entitled to rely upon its own misconstrued version of the stipulations which were

recorded in the Trial Court's Order. It is clear that the two stipulations entered were that 1) the parties could amend their pleadings to claim attorney's fees; and 2) that the issue of attorney's fees was to be a Court tried issue not a jury tried issue.

Finally, Respondent argues that their evidence supported the existence of a contract, failure of Appellant to make the required payment and the application of the statute. (Respondent's Brief at 21) This is simply an attempt to misdirect the Court's attention from the fact that Respondent filed suit on account, and tried the case as a suit on account. (L.F. at 11) The precise wording of § 431.180 makes it applicable to a suit in contract, not in contract **and** on account. The Missouri Approved Instructions require far less to prevail on a suit for account. We traditionally follow the American Rule, which provides that litigants should bear the expense of their own attorney's fees, and only allow an award of attorney's fees in limited circumstances, to balance the equity of a limited situation. *Moore v. Weeks*, 85 S.W.3d 709, 723 (Mo. App. W.D., 2002) (Citations omitted). The Private Prompt Payment statute allows for attorney's fees if there is a contract for private design or construction work, and if all payments set forth in the terms of the contract were not made. It is not the responsibility of the Appellant Obermiller to ensure that Respondent has plead its case correctly, nor to ensure that after a stipulation was entered allowing the parties to amend their pleadings to request attorney's fees, that the pleadings of the Respondent were actually amended as

such.

C. The issue of the Trial Courts Authority is Jurisdictional and thus not required to be preserved as Respondent argues.

Respondent cites Rule 78.07 and two cases to support this portion of its argument. As discussed above 78.07 only supports the position of the Respondent if one looks to 78.07(a) which under the stipulation entered into by the parties, is not applicable in this case. The parties entered into a procedural stipulation in that they agreed that the issue of attorney's fees would be decided by the Court not the jury. Thus, Rule 78.07(b) becomes controlling and under that section the Respondents arguments fail. Next Respondent cites the *Maj* case, the Appellant in *Maj* was limited from appealing certain issues not brought up in an after trial motion. *Maj Investment Corp. v. Wersching*, 612 S.W.2d 364 (Mo. App. 1980). The matters which were disallowed from the appeal were not of the exceptions to 78.07, they were not jurisdictional, nor sufficiency of the evidence arguments, nor were they Court tried issues. *Id*. The issues not allowed were either not properly briefed, or were the issue of a witness's testimony, which was not presented in the after trial motion which was filed. *Id.* The second case cited by Respondent, the plaintiff attempted to amend his pleadings from the negligence case which he lost to the magistrate court to a breech of warranty case on appeal to the circuit court. *McMahon v. Charles Schulze, Inc.*, 483 S.W.2d 666 (Mo. App. 1972). This

change was obviously disallowed. *Id.*

Appellants have always proceeded under the theory that the Trial Court did not have authority to issue attorney's fees to Respondents on their suit on account. This being a jurisdictional argument there is no requirement that the issue be preserved in an after trial motion. The Court's Order of April 2, 2003 exhibits that the Court understood the stipulations even though the Respondents show total misunderstanding of the stipulations, through their arguments.

The Court of Appeals correctly applied the law and stated the exception for preservation on jurisdictional arguments, which can be raised at any stage even on appeal for the first time. *Vance v. Obermiller,* Mo. Ct. App. W.D. 62876, (2005 Mo. App. LEXIS 137).

Respondent argues that "[t]here is no question as to the jurisdiction of the trial court to enter final judgment; the parties were properly before it." (Substitute Brief at pg 31) In stating that the parties were properly before the Trial Court, Respondent correctly includes only one of the three jurisdictional requirements to allow a Court to adjudicate a controversy. *Mo. Soybean Assoc. v. Mo, Clean Water Commn.,* 102 S.W.3d 10 (Mo. 2003). However their reliance that personal jurisdiction is enough to confer the power to adjudicate to the Trial Court is yet another misunderstanding by the Respondent.

"A court's authority to adjudicate a controversy is based on three

> essential elements; the court must have jurisdiction of the subject matter, jurisdiction of the res or the parties, and jurisdiction to render the particular judgment in the particular case. Subject-matter jurisdiction concerns "the nature of the cause of action or the relief sought" and exists only when the court "has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed. A court obtains jurisdiction of the subject matter by operation of law.... And, although a court may be a court of general jurisdiction, when it engages in the exercise of a special statutory power, the court is confined strictly to the authority given by the statute."

Id.. (internal citations omitted). It is therefore directly in dispute whether under the facts and pleadings before the Trial Court in this case, the Trial Court had subject matter jurisdiction to enter an award of attorney's fees on Respondent's Petition on Account, contrary to § 431.180.

1. Section 431.180 specifically applies to an action on contract and not an action on account.

In every argument to the Court, Appellant Obermiller argues for the applicability of § 431.180 to its counterclaim, which sounded in contract. Respondent plead, submitted and prevailed on a suit on account. The Court of

Appeals was incorrect in their finding that a suit on account and a suit on a contract both require the same elements. The verdict director, based upon the Missouri Approved Instruction and the elements of contract are not the same. The Instruction for a suit on account does not, contrary to the finding of the Court of Appeals and the *Welsch* case, require the finding of offer, acceptance, and consideration. *Welsch Furnace Co. v. Vescovo*, 805 S.W.2d 727 (Mo.App. 1991). The Instruction used at trial, attached to the brief of Appellant Obermiller as appendix 2, states:

> "Your verdict must be for plaintiff if you believe:
>
> First, at defendant' request plaintiff furnished to defendant labor and materials between May 16, 2001 and June 10, 2001, and
>
> Second, plaintiff charged a total of $36,492.75 for such labor and materials, and
>
> Third, plaintiff's charges were reasonable."

The very formalities required in a contract are not required to succeed on a suit on account.

Respondent's case was pled as a suit on account, and instructed on MAI 26.03, and submitted with damage instruction 4.01 which is not the damage instruction for a suit on a contract. If it would have been submitted under contract, MAI 4.08 would have been used. The damage instruction would have read, "If you find in favor of plaintiff, then you must award plaintiff such sum as you

believe is the balance due plaintiff under the contract less any sum necessary to correct any variations." (MAI 4.08 (2002)). The proposal lacked a monetary figure which corresponded to the actual work performed. There is a clear difference between a suit on account and a suit on a contract.

Respondent cites the Court's attention to the *Fru-con* Case. *Fru-Con/Fluor Daniel Joint Venture v. Corrigan Bros.,* Inc., No. ED 82587, 2004 WL 2340690, at *6 (Mo. App. E.D. Oct. 19, 2004). However, in that judge tried case, the Trial Court specifically found the parties had entered into a construction contract. *Id.* The Fru-Con case involved large sophisticated construction companies, entering into a multiple paged AIA construction contract. *Id.* That contract calling for over 20 separate periodic progress payments. *Id.* The Fru-Con contract involved the construction of a $485,000,000.00 paper plant in Cape Girardeau, Missouri. *Id.* The Court after specifically finding a contract existed used Quantum Meruit to determine the damages, or the price component of the contract. *Id.* This was due to the existence of over 100 change orders made after the original contract making the contract price inapplicable. *Id*. In Fru-Con the Court specifically awarded prejudgment interest AND attorney fees based on § 431.180. *Id.*

In the Obermiller case the jury specifically rejected its Counterclaim and did not find a contract. There was also no specific finding by the court that a contract existed between Vance and Obermiller.

By the plain language of the statute, § 431.180, its terms are self-limiting to situations in which private design or construction work has proceeded pursuant to the terms of a "contract," and to situations in which the party responsible for making payment has then failed to "…make all scheduled payments pursuant to the terms of the contract." § 431.180 RSMo. (2004).

Suits for "petition on account" and for "breach of contract" are founded on different legal theories. They are proven by distinct elements and utilize different measures of damages. Although a party could plead the counts of "breach of contract" and "account" in the alternative, a party could not properly submit both counts to a trier of fact after the close of evidence.

If the legislature had intended Section 431.180 to apply to a suit on an account in addition to those actions founded solely upon contractual relationships, it would have included such broadening language in the statute, as is evidenced by the legislature's enactment of § 408.020 RSMO. The Court's attention is directed to that argument in the Brief of Appellant.

D. Respondent Misconstrues the Stipulations made and entered by the Trial Court.

Respondent states in its brief at page 33, "In short Appellant and its counsel argued to the Trial Court and obtained a ruling from the Trial Court that the party that prevailed would be entitled to an award of attorney's fees under the statute in

accord with the pleadings that controlled the case." It is clear under the Court's Order that the stipulations were not as Respondent argues. The stipulations were that 1) the parties could amend the pleadings to include a claim for attorney's fees under § 431.180, and 2) that the issue of attorney's fees would be tried by the court not the jury. Nowhere in those stipulations is there anything about the sufficiency of the pleadings. Also completely absent is any stipulation that either party would automatically be awarded attorney's fees upon prevailing at the trial level. The court specifically stated in the Order "attorney fee provisions, may be applicable to Defendant Obermiller, should it prevail against Plaintiff Vance Brother's claims." (L.F. at 90) That sentence makes it clear that the Trial Court understood that the argument was not settled, no one was assured of an award of attorney's fees. That comment also shows that the argument was only pertaining to the applicability to Obermiller. In its last paragraph in section D of its brief on page 34, Respondent yet again misstates the stipulation entered by the Trial Court in stating that the parties "stipulated that the pleadings in the case were sufficient to invoke the Trial Court's authority to award attorney's fees." (Respondent's Brief at 34) It is clear from a reading of the Court's Order, that there was never a stipulation as to authority, and the stipulation on the pleadings was one allowing amendment.

E. Respondent wishes to rely on its own misunderstandings of

the stipulations entered into by the parties.

Appellant is in agreement that when a party enters into an agreement or a stipulation that the party is bound by the stipulation. However, it should go without saying that a party cannot manipulate a clear stipulation into something it was never intended to be. Throughout the Respondent's substitute brief they misstate, misconstrue and ignore the plain meaning of the stipulations entered into and recorded by the Trial Court.

The statement by the Appellant that the Respondent was equally able to demand attorney's fees, is taken from its intended context by Respondent. The stipulation again allowed for the amendment of the party's pleadings to request attorney's fees under § 431.180. Had Respondent plead, or submitted under a contract it too would have been able request attorney's fees under § 431.180, if Vance would have prevailed under contract.

F. Only the Respondent's misstated and misconstrued version of the stipulations could lead to an implication of invited error, not the clear and plain meaning expressed in the Trial Court's Order.

Appellant Obermiller asked the Court to apply § 431.180 to it in the event it was the prevailing party. This decision was never reached by the Trial Court. The Appellant never asked or invited the Trial Court to apply § 431.180 to Respondent, and not until after trial did Respondent ask for the application of § 431.180. The

parties stipulated that they could each amend their pleadings, to request the relief, and that the Court would decide the issue after the jury's verdict. The Respondent did not amend their written pleadings as allowed by the stipulation. Had they requested the relief in an amended pleading it would have still been a matter of subject matter jurisdiction whether the Trial Court had statutory authority to apply § 431.180 to a non-contract case.

Appellant never invited the theory that Respondent was able to recover attorney's fees, under § 431.180 RSMo. Appellant, however, did 'inject' the issue of attorney fees under 431.180 to the case. Appellant claimed that they should be allowed to amend their own pleadings to request the relief and that Respondent was also able to amend their pleadings to request the relief, not that Respondent was actually entitled to the relief.

III. Appellant Obermiller did not fail to preserve its claim of error with respect to an award of interest.

A. Appellant's claim of error with respect to an award of interest is directly related to the jurisdiction of the Trial Court to enter an award of attorney's fees.

As discussed at length above, this portion of the trial was stipulated to be tried before the judge and not before the jury. This stipulation recorded by the Trial Court makes the rule applicable to preservation of error Rule 78.07(b) not

subsection (a) of that rule. Under Rule 78.07(b) a motion for new trial or a motion for amended judgment is not necessary to preserve an issue for appeal. Rule 78.07(b).

Additionally the issue of the award of attorney's fees and not the award of interest goes to the jurisdiction of the Trial Court to enter an award for one and not the other. Thus being a jurisdictional requirement it was not required to be preserved for argument on appeal and could be properly brought for the first time upon appeal.

B. Missouri statute § 431.180 makes an award of attorney's fee and interest permissive at the discretion of the fact finder, however the discretion is not extended to awarding one relief or the other.

The statute is clear in its language. It states:

> "…2. Any person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay. The court may in addition to any other award for damages, award interest at the rate of up to one and one- half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party."

§ 431.180(2) RSMo. (2004) (emphasis added).

The permissive language in the statute is for the award of all or none of the relief allowed by the statute. The Court may,…award interest,…and attorney fees. *Id.* The legislature had options to make the statute read as Respondent wishes this Court to believe it reads. The legislature could have said that the Court may award interest and may award attorney fees. They could have stated may award interest and/or attorney fees. All which would be interpreted the way Respondent wished this Court to interpret the language of the statute as it stands. This is not a statute dealing with public safety as in the *City of St. Louis v. Consolidated Products* case cited by Respondent where the Court allowed an enlargement of the statute to read the 'and' as 'and' or 'or', and not requiring both circumstances to succeed at trial. *City of St. Louis v. Consolidated Products*, 185 S.W.2d 344 (Mo.App. 1945). This statute is a break from the traditional American Rule and should be narrowly construed.

The passage cited by Respondent that allegedly shows the contrary position of Appellant at trial, in fact, follows right along with their contention. They cite the following passage in their brief at page 42:

> I think what [the Prompt Payment Act] shows is that first of all it's within the Courts discretion as to whether or not the penalty of interest and attorney fee award is going to be given, but the state also clearly enables the Court to use that discretion to

award those fees to the prevailing party.

(Substitute Brief at 42, Supp. Trans. 4-1-03 at 3-4) Appellant Obermiller stated that it is within the Court's discretion. This is true the Court has the discretion to award all or none of the remedies available under § 431.180. §431.180 (2004). The language used by Appellant in the cited passage indicates the award of the interest and attorney fees are one award, by stating that the award "is going to be given".

CONCLUSION

Respondent repeatedly and grossly misstates and misunderstands the clear stipulations recorded by the Trial Court. Only upon the distorted view of the stipulations can it be said that Appellant Obermiller invited any error. If Respondent's verdict is upheld, then all suits on account, involving construction materials would allow the recovery of attorney fees.

Appellant Obermiller respectfully requests that this Court either affirm the Court of Appeals decision, or Reverse judgment entered by the Trial Court against it for attorney fees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies in that this brief complies with the requirements of Rule 55.03 and Rule 84.06(b) in that it contains 6219 words. Disks were scanned and were certified virus free. The word count was secured using Microsoft Word.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing, including a copy of the electronic version of the brief in Microsoft word format, were served upon counsel for Respondent on this 17th Day of June, 2005, by placing the same in the U.S. Mail, first class postage prepaid, addressed to:

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